88-1037

Supreme Court, U.S.
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NO. 88-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF ARIZONA,

Petitioner,

-vs-

HONORABLE DANIEL E. NASTRO, a judge of the Superior Court of the State of Arizona, in and for the County of Maricopa,

Respondent,

ELDEN GARDNER,

Real Party in Interest,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

When the defendant is white and his attorney is black, does the Sixth Amendment right to an impartial jury and Batson v. Kentucky, require a prosecutor to explain his peremptory strikes of the only two black veniremen?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15
CERTIFICATION	17
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1

TABLE OF CASES AND AUTHORITIES

Case	Page
Batson v. Kentucky 476 U.S. 79 106 S.Ct. 1712 90 L.Ed.2d 69 (1986)	1,4,7,8,9,10, 11,12,13,15
Lockhart v. McCree 476 U.S. 162 106 S.Ct. 1758 90 L.Ed.2d 137 (1986)	7,10
Nevius v. Sumner 852 F.2d 463 (9th Cir. 1988)	9,10
People v. Rousseau 129 Cal.App.3d 526 179 Cal.Rptr. 892 (App. 1982)	4
Peters v. Kiff 407 U.S. 493 92 S.Ct. 2163 33 L.Ed.2d 83 (1972)	12
State v. Superior Court (Maricopa Cty.) 156 Ariz. 512 753 P.2d 1168 (Ct.App. 1987)	1
State v. Superior Ct. In And For Maricopa Cty. ____Ariz.____ 760 P.2d 541 (1988)	1
Teague v. Lane 820 F.2d 832 (7th Cir. 1988)	7,8,12,16

United States v. Chavez-Vernaza
844 F.2d 1368
(9th Cir. 1987) 9

United States v. Vaccaro
816 F.2d 443
(9th Cir. 1987) 9

28 U.S.C.
§ 1257(3) 2

United States Constitution
Sixth Amendment 3,6,7,8,10,11,12,15
Fourteenth Amendment 3,6,12,15

Arizona Rule of Procedure for
Special Actions, 17A A.R.S.
Rule 1 5

OPINIONS BELOW

The Arizona Court of Appeals held that, under Batson v. Kentucky,[1] a white defendant has standing to object to the state's peremptory challenges of black veniremen and that a white defendant could make a prima facie showing of purposeful discrimination, without being a member of the cognizable racial group. State v. Superior Court (Maricopa Cty.), 156 Ariz. 512, 753 P.2d 1168 (Ct.App. 1987). (Appendix C.)

The Arizona Supreme Court supplemented the court of appeals' opinion, holding that a white defendant can invoke the Sixth Amendment to preclude the use of peremptory challenges that exclude any substantial and identifiable class of citizens from the petit jury. State v. Superior Ct. In And For Maricopa Cty., ____Ariz.____, 760 P.2d 541 (1988). (Appendix A.)

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1. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

STATEMENT OF JURISDICTION

The state asks this Court to review the opinion of the Arizona Supreme Court, entered on July 19, 1988. The Arizona Supreme Court denied the state's motion for rehearing on September 20, 1988. (Appendix B.) This petition is filed within 90 days from the denial of reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

By stipulation, the parties applied for a stay of all proceedings, pending review on certiorari.[2] On October 18, 1988, Honorable Daniel E. Nastro granted the stay of proceedings.

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2. All parties have recognized the importance of the issues presented. Since the issues involved concern the propriety or authority to compel explanations for peremptory challenges, proceeding with trial would render the issues moot. Although the criminal case against Mr. Gardner is still pending, the judgment denying relief by special action in the state courts is final.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state . . . .

The pertinent part of the Fourteenth Amendment of the United States Constitution provides:

> [N]o state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Maricopa County Grand Jury indicted Elden Gardner, real party in interest, for leaving the scene of a fatal automobile accident. His trial before respondent Judge Daniel E. Nastro began on September 24, 1986.

Elden Gardner is Caucasian; his lawyer is black.

During jury selection, the prosecutor peremptorily challenged the only two black veniremen. The defendant objected. Based on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Judge Nastro concluded that the defendant made a prima facie showing of racial discrimination[3] and asked the

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3. The record is not clear concerning what facts or test Judge Nastro used to conclude that the white defendant made a prima facie showing. Referring to People v. Rousseau, 129 Cal.App.3d 526, 536, 179 Cal.Rptr. 892, 897 (App. 1982), Judge Nastro apparently used the California test, which, unlike Batson, does not require a showing of membership in the same cognizable racial group.

prosecutor to explain his use of the peremptories. (Appendix C at C-3.) Arguing that the defense had not made an adequate showing, the prosecutor refused to explain his reasons for striking the jurors. On stipulation, the trial court stayed the proceedings while the prosecutor filed an action in the Arizona Court of Appeals seeking special action relief in the nature of mandamus.[4] The court of appeals granted review, but denied relief. (Appendix C.)

The state then sought relief from the Arizona Supreme Court, both by an independent petition for special action and by a petition for review.

The Arizona Supreme Court concluded that the trial judge relied on the equal

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4. In Arizona, relief previously obtained by extraordinary writs of certiorari, mandamus, and prohibition is now obtained by "special action." (Rule 1, Arizona Rule of Procedure for Special Actions, 17A A.R.S.)

protection clause of the Fourteenth Amendment "and, arguably on the Sixth Amendment right to trial by an impartial jury. . . ." (Appendix A at A-4.) The court granted review and approved the opinion of the court of appeals as supplemented. (Appendix A.) On September 20, 1988, the Arizona Supreme Court denied a timely filed motion for reconsideration. (Appendix B.) The state now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Arizona courts' interpretations of federal constitutional law will allow every defendant to insist upon compelled explanations of peremptory challenges, whether based upon the Sixth Amendment or Batson.

I

AN IDENTICAL OR SIMILAR QUESTION IS PENDING BEFORE THIS COURT.

This Court is presently considering whether the Sixth Amendment right to a trial by an impartial jury compels explanation of peremptory challenges that exclude a distinctive group. Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), cert. granted, ____U.S.____, 108 S.Ct. 1106 (Mar. 7, 1988) (Oct. Term, 1987, No. 87-5259). Although this Court has declined to extend the Sixth Amendment fair cross-section principle to petit juries, the Arizona Supreme Court did so in this case. Lockhart v. McCree, 476

U.S. 162, 173-74, 106 S.Ct. 1758, 1764-65, 90 L.Ed.2d 137, 147-48 (1986). This case should be held pending the resolution of Teague, or set for argument to be considered simultaneously.

This petition poses the additional unresolved question of whether a Caucasian may invoke a Batson v. Kentucky claim.

II

THERE IS A CONFLICT BETWEEN THE DECISIONS OF THE COURT OF APPEALS AND HIGHEST STATE COURT WITH THE SAME TERRITORIAL JURISDICTION.

On three occasions, the Ninth Circuit Court of Appeals issued opinions that conflict with that of the Arizona Supreme Court. In response to the nonblack defendants' claim of a violation of Sixth Amendment rights, the Ninth Circuit applied the Batson test and held that nonblack defendants cannot make out a prima facie case of discrimination by peremptory challenges of black veniremen,

and that striking the only two black jurors did not constitute a pattern of systematic exclusion of blacks. United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987), cert. denied, 108 S.Ct. 295 (1987). In United States v. Chavez-Vernaza, 844 F.2d 1368, (9th Cir. 1987), the Ninth Circuit held that, where the government used its peremptory challenges to exclude the only black members of the venire, the Peruvian national defendant did not make a prima facie case under Batson, because he did not show that he was a member of a cognizable racial group and he did not show that the prosecutor exercised peremptory challenges to remove veniremem of the defendant's race.

More recently, in Nevius v. Sumner, 852 F.2d 463 (9th Cir. 1988), the black defendant contended that the prosecutor's peremptory challenges to exclude black

and Hispanic veniremen violated his Sixth Amendment right to a fair and impartial jury. Citing Lockhart v. McCree, 476 U.S. at 174, the court held that the Sixth Amendment fair cross-section requirement does not apply to the petit jury. Nevius at 466.

The appended Arizona Supreme Court's and Court of Appeals' opinions conflict with the Ninth Circuit by holding that a white defendant can make a prima facie showing of purposeful discrimination under Batson without being a member of a cognizable racial group. The Arizona Supreme Court opinion conflicts with the Ninth Circuit Court of Appeals by extending the Sixth Amendment fair cross-section principle to the selection of the petit jury.

III

THIS CASE PROVIDES THE OPPORTUNITY TO CLEARLY ESTABLISH THE FUTURE OF PEREMPTORY CHALLENGES.

This case of a white defendant with a black attorney, and peremptory challenges of the only two blacks on the jury panel, affords this Court the opportunity to decide and clarify significant recurring questions of constitutional law.

The question of whether the Sixth Amendment fair cross-section principle requires that an attorney explain his peremptory challenges, was specifically presented to this Court in Batson v. Kentucky, 106 S.Ct. at 1716 n.4; however, this Court has yet to answer that question. Arizona contends that the guarantee of a trial by an impartial jury is not violated when there is no claim of partiality or bias in the unchallenged veniremen. The focus of the query should be on the veniremen who remain, not on those who were challenged. The analysis

of the Arizona Supreme Court elevates demographics to a higher priority than the impartiality of the seated jurors.

Even if Sixth Amendment issues are resolved in Teague v. Lane, the question of the defendant's standing to assert constitutional rights under Batson remains confused and unresolved. Based upon this Court's plurality opinion in Peters v. Kiff,[5] the Arizona Court of Appeals concluded that Mr. Gardner had standing to raise a Fourteenth Amendment equal protection claim in petit jury selection, without being a member of the cognizable racial group. This Court should clarify whether Peters, standing for a due process claim, extends to a Batson equal protection claim, so that

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5. Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) (a white defendant had standing to assert a claim that exclusion of Negros from the grand jury and petit jury lists violated his Fourteenth Amendment due process rights).

any defendant may assert Batson. Arizona contends that such an extension wrongfully permits Gardner to claim the right of a protected group to which he does not belong.

This Court should also grant review to determine whether the requirement of Batson, that a defendant must show he is a member of a cognizable racial group, is flexible or disposable. The Arizona Court of Appeals subverted the requirement of membership, relying on Batson, 106 S.Ct. at 1721, n.18, which provided:

> Our decisions in the context of Title VII 'disparate treatment' have explained the operation of prima facie burden of proof rules. The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion.

(Citations omitted.) This Court should clarify whether the Batson evidentiary requirement of a defendant's membership in a cognizable group, Batson v. Kentucky, 106 S.Ct. at 1722-23, can be subverted by a

permissive reading of flexible rules in Title 7 cases.

The Arizona opinions below invite boundless piecemeal litigation. Probably the most common aspect to all trials in the United States is jury selection. If the purposes of compelled explanations are truly to eliminate discrimination in petit jury selection, to create petit juries that fairly represent a cross-section of the community, and to avoid the exclusion of identifiable groups from the rights and obligations of jury service, then those purposes could never be fulfilled by a limit of inquiries to prosecutors or even to criminal cases. The doors opened by the Arizona Supreme Court threaten to create a plethora of workability problems, which far outweigh the theoretical protection from the possibility of discrimination in peremptory challenges.

CONCLUSION

The Fourteenth Amendment equal protection of the laws does not require that a prosecutor explain his peremptory challenges of the only two black jurors in response to the objection of a white defendant. The Arizona Supreme Court's approval of the Arizona Court of Appeals' opinion erroneously extends Batson v. Kentucky to compel an explanation.

Further, the Arizona Supreme Court erroneously extended the Sixth Amendment fair cross-section principle to the petit juries, which this Court has declined to do. The Arizona decisions are in conflict with those of the Ninth Circuit Court of Appeals.

Because of the importance of the issues, the conflict between the highest state court and the federal appellate court having the same territorial jurisdiction, and the identical or

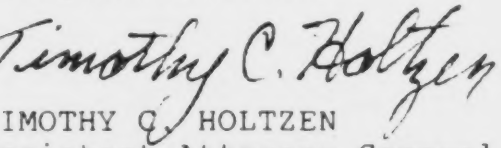
similar issue before this Court in Teague v. Lane, the petitioner requests that this Court accept the petition for writ of certiorari and review the conjoined opinions of the Arizona Supreme Court and the Arizona Court of Appeals.

DATED this 14th day of December, 1988.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division



TIMOTHY C. HOLTZEN
Assistant Attorney General

Attorneys for PETITIONERS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

TIMOTHY C. HOLTZEN, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon Dean W. Trebesch, Maricopa County Public Defender, 132 South Central, 2nd Floor, Phoenix, Arizona, 85004, attorney for Elden Gardner, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Additionally, as a courtesy, he herewith certifies that service of one copy of this petition has been made upon the Honorable Daniel E. Nastro, Judge of the Maricopa County Superior Court, 101 West Jefferson, #612, Phoenix, Arizona 85003-0000, by depositing the same in the United States Mail, with first class postage prepaid.

DATED this 14th day of December, 1988.

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SUBSCRIBED AND SWORN to before me this 14th day of December, 1988.

Chris L. Piske

CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:

October 28, 1989

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APPENDICES

APPENDIX A

[Filed July 19, 1988]

IN THE SUPREME COURT OF
THE STATE OF ARIZONA
En banc

STATE OF ARIZONA, through the Criminal Division of the Attorney General's Office,	)	Supreme Court No. CV-87-0111-PR
Petitioner,	)	
vs.	)	Court of Appeals No. 1 CA-SA 025
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, HONORABLE DANIEL E. NASTRO, a Judge thereof,	)	
Respondent Judge,	)	Maricopa County No. CR-155598
ELDEN GARDNER,	)	
Real Party in Interest.	)	

Appeal from the Superior Court
of Maricopa County

The Honorable Daniel E. Nastro, Judge

AFFIRMED

Opinion of the Court of Appeals, Division One, ____Ariz.____, ____P.2d ____ (App. 1987) Approved as Supplemented

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Attorneys for Petitioner

Dean W. Trebesch — Phoenix
Maricopa County Public Defender
By: Stephen M. R. Rempe
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Feldman, Vice Chief Justice

The state seeks relief from an order requiring the prosecutor to explain his use of peremptory challenges against two Black members of a jury panel. The court of appeals affirmed, State v. Superior Court, No. 1 CA-SA 025 (Ariz.Ct.App. Jan. 22, 1987), and we granted review to consider whether a Caucasian defendant has standing to object to a prosecutor's alleged discriminatory use of peremptory challenges to remove all Black members of a jury panel. We have jurisdiction under Ariz. Const. art. 6, § 5.

FACTS

Defendant, Elden Gardner, was charged with leaving the scene of a fatal accident, a class 6 felony. A.R.S. §§ 28-661 and -663. Gardner is Caucasian; his trial attorney was a Black deputy public defender. During jury selection in Maricopa County Superior Court, the prosecutor used peremptory challenges to strike the only two Black members of the jury panel. Gardner objected. After a hearing, the trial judge concluded the defendant had made a prima facie showing of racial discrimination and asked the prosecutor to explain the use of the peremptories. The prosecutor refused, claiming the judge had no power to initiate such an inquiry except in cases where the defendant and the excluded veniremen were members of the same cognizable racial

group. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). Because the challenged jurors were Black and defendant was Caucasian, the state argued that the Batson rule was inapplicable. Relying on the equal protection clause of the fourteenth amendment and, arguably, also on the sixth amendment right to trial by an impartial jury, the judge ruled that he had a proper basis to inquire into the prosecutor's motives in using the peremptory challenge to strike the Black veniremen.

The state sought special action relief from the court of appeals.[1] That court stayed further proceedings in the trial court, accepted jurisdiction of the

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[1] In Arizona, relief formerly obtained by writs of prohibition, mandamus or certiorari is now obtained by "special action." Rule 1, Arizona Rules of Procedure for Special Actions, 17A A.R.S.

special action petition and denied relief from the trial court's ruling. The court of appeals held that a Caucasian defendant had standing to challenge a prosecutor's allegedly racially motivated use of the peremptory challenge to remove all Black members of the jury panel. The court also upheld the trial judge's finding that defendant had made a prima facie showing that the prosecutor had purposefully discriminated in using the peremptory challenges. In effect, therefore, the court of appeals affirmed the order requiring the prosecutor to explain his use of the peremptory challenge. The state now seeks both review and special action relief from this court, asking us to vacate the order of the trial judge. See Rule 8, Ariz.R.P.Spec.Act., 17A A.R.S., and Rule 23, Ariz.R.Civ.App.P., 17A A.R.S. We decline to do so.

PRESENT STATUS OF THE LAW

At the outset, we reiterate certain basic principles. The law does not permit the state to discriminatorily exclude any "substantial and identifiable class of citizens" from the privilege and obligation of jury service. See Peters v. Kiff, 407 U.S. 493, 503, 92 S.Ct. 2163, 2169 (1972). As Judge Jacobson wrote in the majority opinion for the court of appeals, such an idea is "antithetical to the notion that juries must represent the range of human nature and the variety of human experience." Slip op. at 5, citing Peters. The recent changes in the law worked by Batson and its progeny have thus been more procedural than substantive.

The Batson Court demonstrated this principle by its modification of the holding in Swain v. Alabama, 380 U.S.

202, 85 S.Ct. 824 (1965). In Swain, the Court reaffirmed that the state's purposeful discrimination in jury panel selection violated the equal protection clause of the fourteenth amendment. Swain admonished that

> [f]or racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution ... but is at war with our basic concepts of a democratic society and a representative government.

Id. at 203-04, 85 S.Ct. at 827, quoting Smith v. State of Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165 (1940).

Swain held, however, that there was a presumption that the prosecution had used its peremptory challenge for a permissible reason. The presumption could be overcome only by a showing of systematic exclusion rather than by the state's conduct in a particular case. 380 U.S. at 223, 85 S.Ct. at 837.

However, when Swain was decided, the court had not yet incorporated sixth amendment guarantees into the safeguards afforded by the fourteenth amendment. See Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968) (sixth amendment first declared binding on states). Thus, the issues raised in Swain involved only the equal protection clause of the fourteenth amendment.

In State v. Wylie, 144 Ariz. 525, 698 P.2d 1244 (1985), this court expressly cited and followed Swain to support our refusal to "[require] an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Wylie, 144 Ariz. at 535, 698 P.2d at 1254. In Wylie, however, the defendant did raise both sixth amendment and equal protection challenges. Defendant argued that his sixth amendment right to a trial

by an impartial jury encompassed the right to be tried by a jury drawn from a fair cross-section of the community. See, e.g., Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029 (1978) (a five-member jury does not adequately represent the community as required by sixth amendment); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986).

We noted in Wylie that the district court in McCray ruled that the right to a representative cross-section in jury composition prohibited the prosecution from using peremptory challenges to exclude an entire ethnic or racial group from the trial jury. Wylie, 144 Ariz. at 535, 698 P.2d at 1254. Nonetheless, we adopted Swain's rule whether the attack

on discriminatory use of the peremptory challenge was based upon equal protection grounds, sixth amendment rights or the identical right guaranteed in art. 2, § 24 of the Arizona Constitution. Wylie, 144 Ariz. at 536, 698 P.2d at 1255. We recognized, however, that the holding was procedural and the state had no substantive right to discriminate against or exclude members of any group. As Justice Cameron stated for the majority:

> We remind the state that the duty of the prosecution is to seek justice, not merely to convict. It is entitled, therefore, not to a jury biased in its favor but to one that will view the evidence fairly and impartially. It should use its peremptory challenges toward this end. In view of the potential harm to this extremely important right [of peremptory challenge], however, we will not look behind the removal of jurors to the prosecutor's reasons for striking them. Rather, we will continue to adhere to the Swain rationale that a defendant is not entitled to a new trial unless he is able to show systematic exclusion of an identifiable group.

Id. at 537, 698 P.2d at 1256 (citations omitted).

Many jurists questioned Swain's applicability to cases in which the sixth amendment was raised. See Perry v. Louisiana, 461 U.S. 961, 103 S.Ct. 2438 (1983); Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987); Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985) (discriminatory use of peremptory challenges violates sixth amendment), on remand, 801 F.2d 871 (6th Cir. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 910 (1987); Wylie, 144 Ariz. at 543, 698 P.2d at 1262 (Feldman, J., specially concurring).

Indeed, even in equal protection cases, Swain's evidentiary requirements did not long prevail. In 1986, Batson overruled the portion of Swain requiring proof of systematic exclusion. The Court held that a defendant could establish a prima facie case for an equal protection violation even though his evidence was

based solely on the prosecutor's exercise of peremptory challenges at that defendant's own trial.

Obviously, subsequent cases have undercut the reasoning in Wylie. Wylie stressed the "importance" of peremptory challenges and the consequent need that "their use should not be impaired or infringed upon." 144 Ariz. at 537, 698 P.2d at 1256. The decision in Batson now permits the very infringements on the use of peremptory challenges that Swain previously prohibited. Thus, we must overrule Wylie. Its attempt to preserve the full reach of the peremptory challenge is now an anachronism which we cannot follow on either federal or state grounds. We hold, therefore, that a prosecutor's racially motivated use of peremptory challenges in a particular case violates the jury guarantee clause of the sixth amendment.

"STANDING"

A. Is the prohibition against discrimination limited only to situations where the defendant and excluded or rejected jurors were of the same race?

The state contends that this defendant, a Caucasian, has no standing to complain of the exclusion of Black veniremen. We disagree with this argument for several reasons.

Defendant argues that under the sixth amendment to the federal constitution his right to an "impartial jury" includes the opportunity to obtain a jury comprising a fair cross-section of the public. This principle is well established. See Ballew, Peters, McCray, Wheeler, Gilmore. Obviously, this right is implicated not only when those rejected for discriminatory motives are members of the defendant's own racial or ethnic group. The discriminatory exclusion of jurors from any cognizable group

necessarily violates the right to a chance for a fair cross-section, no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge or any party to the action. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987); Fields v. People, 732 P.2d 1145 (Colo. 1987); Gilmore, 103 N.J. at 536 n.9, 511 A.2d at 1164 n.9.

The state argues that the explicit language of Batson applies only to those cases in which the excluded jurors and the defendant himself are of the same racial group. This is true.[2] We believe,

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[2] As a result, other jurisdictions have interpreted Batson to require the defendant to be a member of a cognizable racial group and that the prosecution exercise challenges to remove that group's members from his jury. See Smith v. State, 515 So.2d 149 (Ala.Crim.App. 1987); Kibbler v. State, 501 So.2d 76 (Fla.Dist.Ct.App. 1987); Pope v. State, 256 Ga. 189, 345 S.E.2d 831 (1986); Phillips v. State, 496 N.E.2d 87 (Ind. 1986); State v. Christensen, 720 S.W.2d 738 (Mo.App. 1986); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986).

however, that the language of Batson's holding was aimed at the specific facts and legal issues presented to the Court. Lacking specific guidance from the Supreme Court, we must determine in this case whether the Batson principle applies to situations going beyond Batson's specific facts and to those involving the jury trial guarantee of the sixth amendment.

Arizona provides an illuminating frame of reference. This state has a rich and diverse racial and ethnic composition of Native American, Hispanic, Caucasian, Black, Oriental and other citizens. Throughout Arizona's history, members of a wide variety of racial, ethnic and religious groups have settled in the territory and state, contributing their unique cultures, traditions and views to those of Arizona's indigenous peoples. Both the newcomers and the native peoples of this region have contributed

immeasurably to the growth and development of our state. If we apply the Batson principle exclusively to those cases in which the defendant and the excluded jurors are of the identical racial or ethnic group, our trial judges and lawyers will frequently be forced to inquire into the racial and ethnic makeup of particular jurors. If possible we should adopt the rule that would obviate or reduce the necessity for such an unseemly and intrusive procedure.[3]

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[3] One such case has already come to the attention of this court. In State v. Claborne, No. CV-87-0117-SA, the defendants were Ernest "Bunky" Maestas and John David Maestas. The prosecutor allegedly used peremptory challenges to exclude all Native Americans from a jury which was to try two Hispanic Americans. We declined jurisdiction for procedural reasons, ignoring the very issue raised here. We did not, however, thereby indicate our approval of the concept that our courts should become involved in deciding at what point a Hispanic American becomes a Native American or vice versa. Any rule of law that would make such inquiries relevant to the decision-making process is to be avoided.

B. Trial juries.

Some may argue that the sixth amendment guarantee of an "impartial jury" prohibits the state from discriminating in the selection of the jury panel, but not in the selection of the trial jury. We reject this hypothesis. Any discriminatory exclusion from either the jury panel or the trial jury directly impairs the constitutional right to the opportunity to obtain a jury drawn from a fair cross-section of the community. McCray, 750 F.2d at 1128. In either event, a discriminatory process has skewed the demographic odds and created a racially selected jury. In such cases, the state's discrimination against a "distinctive group" deprives a defendant of the opportunity to obtain a trial jury representing a fair cross-section of the community. See Buchanan v. Kentucky, ____ U.S. ____, ____, 107 S.Ct. 2906, 2913-14 (1987).

The harm done by such state discrimination is not limited to violation of a defendant's constitutional rights. It also damages our system of justice by depriving minorities of their opportunity for jury service, one of the most important privileges and responsibilities of citizenship. Worse yet, such methods create a perception that the American criminal justice system is imposed on certain minorities rather than operating to protect and further the rights of all citizens.

For these reasons, we believe that the sixth amendment guarantee of an impartial jury forbids the state from discriminating in jury selection, whether before or after the drawing of the names of the veniremen. We therefore adopt a clear, simple rule: under the jury trial clause of the sixth amendment, the state

may not make discriminatory use of the peremptory challenge to exclude any substantial and identifiable class of citizens from the privilege and obligations of jury service. See Buchanan. Peters.[4]

This is not to say, of course, that the state is forbidden to exclude any or all members of a cognizable group from the trial jury under any circumstances.

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[4] Of course, the United States Supreme Court may disagree with our view and interpret the sixth amendment guarantee more restrictively than we have in this opinion. In this event, interpretation of the jury trial guarantee contained in art. 2, § 24 of the Arizona Constitution would become determinative. See Deer Valley Unified School District v. Superior Court, No. CV-86-0577-T (Ariz.S.Ct. June 30, 1988). For some reason, neither party to this case has raised, relied on or discussed the Arizona rescript of the federal provision. Thus, this opinion does not reach the question of whether we would interpret art. 2, § 24 of the Arizona Constitution so as to forbid state discrimination through the use of the peremptory challenge. Cf. Deer Valley.

Neither equal protection concepts nor the right to trial by a fair cross-section of the population gives the defendant the right to a trial jury of any particular composition. Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758 (1986); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975); McCray, 750 F.2d at 1129; Wheeler. The constitution only prohibits the prosecutor from destroying the possibility of a fair cross-section by the discriminatory use of peremptory challenges to exclude jurors because of their membership in an identifiable group. Roman, McCray, Wheeler, Gilmore. The prosecutor is as free as ever to use the peremptory challenges to exclude jurors for nondiscriminatory reasons.

Like the Batson rule, the construction we today give to the sixth amendment is retroactive to those cases not yet final

or pending on direct appeal as of the date of this opinion. See Griffith, 479 U.S. at ____, 107 S.Ct. at 716. Of course, as in the cases presenting the original Batson issue, waiver governs the retroactivity issue. See State v. Holder, 155 Ariz. 83, 745 P.2d 141 (1987) (Batson challenge does not involve fundamental error and was waived absent timely objection).

In the instant case, we conclude, therefore, that the trial judge neither exceeded his jurisdiction nor erred in requiring the county attorney to provide an explanation for the use of peremptories excluding all Black veniremen from the jury.

DEFENDANT'S PRIMA FACIE SHOWING

The state argues, finally, that the defendant failed to make a prima facie showing that the state made

discriminatory use of the peremptory challenges. We agree with the court of appeals' opinion and analysis on this point.

CONCLUSION

We affirm the trial judge's order. We approve the opinion of the court of appeals as supplemented by this opinion and remand this case for further proceedings consistent with this opinion.

STANLEY G. FELDMAN,
Vice Chief Justice

CONCURRING:

FRANK X. GORDON, JR., Chief Justice

JAMES DUKE CAMERON, Justice

WILLIAM A. HOLOHAN, Justice

JAMES MOELLER, Justice

APPENDIX B

ORDER OF THE ARIZONA SUPREME COURT

SUPREME COURT

STATE OF ARIZONA

201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2866

TELEPHONE (602) 255-4536

September 21, 1988

RE: STATE OF ARIZONA vs. SUPERIOR CT-MARICOPA CO - HON. DANIEL E. NASTRO et al
Supreme Court No. CV-87-0111-PR
Court of Appeals No. 1 CA-SA 025
Maricopa County No. CR-155598

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 20, 1988, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration [Petitioner State of Arizona] = DENIED.

Mandate enclosed.

DAVID R. COLE, Clerk

TO:

Hon. Robert K. Corbin, Attorney General
Attn: Timothy C. Holtzen, Esq.

Dean W. Trebesch, Maricopa County Public Defender
Attn: Stephen M.R. Rempe, Esq.
and Mary Lynn Bogle, Esq.

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APPENDIX C

OPINION OF THE COURT OF APPEALS

[Filed Jan. 22, 1987]

IN THE COURT OF APPEALS
THE STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, through the Criminal Division of the Attorney General's Office,	)	1 CA-SA 025
	)	DEPARTMENT C
Petitioner,	)	
vs	)	
SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, HONORABLE DANIEL E. NASTRO, a Judge thereof,	)	OPINION
Respondent Judge,	)	
ELDEN GARDNER,	)	
Real Party in Interest.	)	

Appeal from the Superior Court
of Maricopa County

Cause No. CR-155598

The Honorable Daniel E. Nastro, Judge

REVIEW GRANTED; RELIEF DENIED;
STAY VACATED

Robert K. Corbin Phoenix
Attorney General
by: Tim Holtzen
Criminal Division, Department of Law
Assistant Attorney General
Attorneys for Petitioner

Ross P. Lee, Phoenix
Maricopa County Public Defender
by Mary Lynn Bogle,
Deputy Public Defender
Attorneys for Real Party in Interest

JACOBSON, Judge

This special action filed by the state requires us to determine whether a prosecutor must disclose his reasons for the exercise of peremptory challenges used to strike two black veniremen from a jury panel. Because this is a matter of first impression in this state and is of statewide interest, we accept jurisdiction of the special action.

The state contends the trial court erred: (1) by determining that defendant real party in interest, a caucasian, has made a prima facie showing that the prosecutor engaged in purposeful discrimination; and, (2) by acting arbitrarily and capriciously and thus abusing

his discretion in requiring the prosecutor to disclose reasons for striking the two black veniremen.

Elden Gardner, defendant real party in interest, was indicted on February 25, 1986 and charged with one count of leaving the scene of a fatal accident, a class 6 felony. His trial before respondent Judge Daniel E. Nastro began on September 24, 1986. Defendant is caucasian. He is being represented by a black attorney from the Office of the Public Defender.

During jury selection, the prosecutor exercised two peremptory challenges that resulted in the striking of the only two black veniremen present. The defendant objected to this use of the state's peremptory challenges. Based on the objection, a hearing was conducted in chambers at which Judge Nastro requested that the state disclose its reasons for the exercise of the peremptory challenges to exclude blacks from the panel. Judge Nastro

based his request on Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The state refused to comply and sought special action relief in this court. The proceedings on stipulation were stayed pending our decision on the state's petition.

The state's argument is essentially two-fold. It first contends that defendant does not have standing to object to striking members of the jury panel who are not of the same race as the defendant. The state contends that Batson, supra, mandates that the defendant must first show that he is a member of a racial group capable of being singled out for differential treatment, and that the peremptory challenges at issue were exercised against members of defendant's race. Because defendant is white, it is urged, he has no standing to contend that his rights have been violated by the exclusion of blacks from the jury panel.

The second prong of the state's argument under Batson is that because defendant is white, the trial court abused its discretion in requiring the prosecutor to disclose reasons for the challenges because the defendant is unable to make a prima facie showing that the prosecutor is engaging in purposeful discrimination. We disagree with both arguments.

Prior to the decision in Batson, the law dealing with purposeful discrimination in the selection of jurors was defined by Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Swain required the defendant to demonstrate that the state systematically excluded an identifiable group from jury service. 380 U.S. at 224, 85 S.Ct. at 838, 13 L.Ed.2d at 775, see State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985). As a result, proof of the repeated striking of blacks over several cases was necessary to establish a violation by the state of the defendant's right to equal protection.

Batson, supra at n. 10. This "evidentiary formulation" insulated the prosecutors' use of peremptory challenges from constitutional scrutiny. 476 U.S. at ___, 106 S.Ct. at 1720, 90 L.Ed.2d at 84. Illustrative of this insulation is the Arizona Supreme Court decision in State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985), which held that absent a showing of systematic exclusion, there was no constitutional requirement that the trial judge investigate the prosecutor's reasons for his exercise of peremptory challenges. 144 Ariz. at 537, 698 P.2d at 1256.

Batson overrules that portion of Swain which requires the showing of systematic exclusion. 476 U.S. at ___, 106 S.Ct. at 1720, 90 L.Ed.2d at 85. Other than a decision by the Court of Appeals, Division 2, which holds that Batson may not be applied retroactively, no Arizona appellate court has reviewed the substantive application of the Batson standard. Accordingly, the issues before us are of first impression.

We examine first the state's argument that a white defendant has no standing to object to the peremptory exclusion of black veniremen.

In our opinion the standing issue is controlled by Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972) (plurality opinion) where the United States Supreme Court first examined the problem posed by a white defendant's challenge to the exclusion of blacks from jury service. In Peters, decided under Swain, a white defendant alleged that blacks were being systematically excluded from the grand jury which indicted him, and from the petit jury which convicted him of burglary. The court found that the race of the defendant did not preclude him from gaining standing to challenge the exclusion of blacks. Peters indicated that exclusion from jury service by the state of a "substantial and identifiable class of citizens" is antithetical to the notion that juries must represent the range

of human nature and the variety of human experience. See 407 U.S. at 504, 92 S.Ct. at 2169, 33 L.Ed.2d at 95. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (male defendant held to have standing to challenge exclusion of women from jury service); People v. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978). To demonstrate this point, the Court held that:

> [w]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

407 U.S. at 504, 92 S.Ct. at 2169, 33 L.Ed.2d at 95.

The state bases its standing argument on the language in Batson, supra, which requires a defendant to be of the same race as the veniremen being excluded. In our opinion the "same class" language of Batson, goes not to the issue of standing (right to use the issue), but is directed

only toward the establishment of a prima facie evidentiary case of purposeful discrimination. Thus, if the defendant and excluded veniremen are of the same race, a strong evidentiary inference may be drawn that prima facie purposeful discrimination has occurred and the burden thereby shifted to the state to explain its actions.

We are supported in this view by the prima facie burden of proof rules established in the "disparate treatment" causes under Title VII of the Civil Rights Act of 1964. Batson, supra, at n. 18. The seminal case is McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). McDonnell Douglas held that the party alleging disparate treatment may make out a prima facie case by showing first that he or she is a member of a "racial minority." However, this premise is qualified in a footnote:

> [t]he facts necessary will vary in a Title VII case, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

McDonnell Douglas Corp. v. Green, supra, at n. 13. The qualification was made law in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) where white employees of the defendant were held to have made a prima facie case of racial discrimination, even though they were not members of a "racial minority." 427 U.S. at 278, 96 S.Ct. at 2578, 49 L.Ed.2d at 500. Referring with approval to the language cited above from McDonnell Douglas, the Court noted that:

> [r]equirement (1) of this sample pattern of proof was set out only to demonstrate how the racial discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination.

McDonald v. Santa Fe Trail Transportation Co., supra, at n. 6.

Given the continuing line of cases which reject the so-called "same class rule," we reject a reading of Batson, supra, that would require that defendant Gardner be of the same race as the stricken jurors to have standing to object.

We turn now to the second prong of the state's argument - that defendant is unable to make a prima facie showing that the prosecutor engaged in purposeful discrimination by his exercise of the peremptory challenges. Again, the state, in our opinion, mistakenly premises the argument on a reading of Batson that requires the defendant to be of the same race as the excluded veniremen.[1]

1/ But see Pope v. State, 256 Ga. 196, 345 S.E.2d 831 (1986); State v. Christensen, No. SD-36803 (Mo. App. 1986). Both Pope and Christensen hold that a white defendant cannot establish a prima facie case if not a member of a cognizable racial group. For the reasons discussed in this opinion, we refuse to follow these cases.

Petitioner relies on the language in Batson which states that to establish a prima facie case of purposeful discrimination in selection of the petit jury:

> the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.

476 U.S. at ___, 106 S.Ct. at 1723, 90 L.Ed.2d at 87.

We agree, as evidenced by our previous discussion, that the above quoted language provides the trial judge with a strong basis for finding a prima facie case of purposeful discrimination. We do not agree that this "same-class" criteria is the exclusive test to determine whether purposeful discrimination has occurred. In Batson, the Supreme Court indicated that the trial judge, in addition to the "same class" factor, was to consider "any other relevant

circumstances [which] raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." Id. at 1723. See Clark v. City of Bridgeport, ____ F. Supp. ____, Div. Nos. B-83-514 (TFGD), B-86-119 (TFGD), B-86-116 (TFGD) (Dist. Conn. 1986); Wilder v. State, ____ N.E.2d ____, No. 71A03 8605-CR-150 (Ind. App. 1986).

From our reading of Batson, it is clear that the initial burden is upon the trial judge to make the discretionary determination as to whether there is sufficient evidence of purposeful discrimination in the peremptory striking of veniremen to require explanation by the prosecution for its actions. 476 U.S. at ___, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. In this regard, the Court stated:

> [i]n deciding whether the defendant has made the requisite showing, the trial court should

> consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenge may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's peremptory challenges creates a prima facie case of discrimination against black jurors.

476 U.S. at ___, 106 S.Ct, at 1723, 90 L.Ed.2d at 88.

Given the broad discretion afforded the trial judge in these circumstances, we find neither arbitrary or capricious action by the respondent trial judge, nor any abuse of his discretion. We, of course, express no opinion as to whether any explanation of the prosecution for its actions would justify a nonracial reason for the exercise of the peremptory challenges in this case. Accordingly, we

exercise our discretion in granting jurisdiction of this special action, but deny relief. The stay previously issued in this matter is vacated.

/S/
Eino M. Jacobson, Judge

CONCURRING:

/S/
Bruce E. Meyerson, Presiding Judge

SHELLEY, Judge, dissenting:

I respectfully dissent. In my opinion, a white defendant normally does not have standing to contest the use of peremptory challenges to strike the only blacks from a jury. However, because this defendant is represented by a black attorney, the fact situation is sufficient to satisfy the principles set forth in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The majority mistakenly holds that the standing issue is controlled by Peters v.

Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972). In that case, peremptory challenges were not involved. The case involved the systematic exclusion of blacks from being initially drawn for grand and petit juries. In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the jurors were excluded from the venire. Peremptory challenges were not involved.

Batson makes it clear that the prosecutor's historical privilege of peremptory challenges should be as free from judicial control as possible. This right is deeply rooted and comes from common law. Batson held that if a prosecutor was required to explain his reasons for exercising peremptory challenges, that explanation did not need to rise to the level justifying challenge for cause. The question to be determined was whether the peremptories made were based solely on the

prosecutor's intuitive judgment that they would be partial to the defendant because of their shared race. The Batson case held:

> The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.
>
> * * *
>
> But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race. (Emphasis added - citations omitted)

____ U.S. at ____, 106 S.Ct. at 1722-23, 90 L.Ed.2d at 87-88.

In the case of Phillips v. State, ____ Ind. ____, 496 N.E.2d 87 (1986), the Indiana Supreme Court, referring to Batson, stated:

> To establish such a case, appellant must show: 1) he is a member of a cognizable racial group; 2) the prosecutor has exercised peremptory challenges to remove that group's members from his jury; and 3) the facts and circumstances of his case raise an inference the exclusion was based on race. Batson, supra. Once appellant has made a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor's explanation need not rise to the level of a challenge for cause. The trial court will then have the duty to determine whether appellant has established purposeful discrimination. (Emphasis added)

Id. at ____, 496 N.E.2d at 89.

Phillips interprets Batson to require that the defendant must be a member of a cognizable racial group and that the prosecutor has exercised challenges to remove that group's members from his jury.

In State v. Jackson, ____ N.C. ____, 343 S.E.2d 814 (1986), the court interpreted Batson as follows:

> The Court stated that in order to establish such a prima facie case, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that lends itself to potential abuse; and third, the defendant must show that these facts and any other relevant circumstances (e.g., a pattern of strikes against black jurors in a particular voir dire, questions and statements by the prosecutor during voir dire, etc.) raise an inference that the prosecutor used peremptory challenges to exclude prospective jurors on the basis of race. (Emphasis added)

Id. at ____, 343 S.E.2d at 820.

The reasoning in Phillips and Jackson is entirely consistent with the holding in Batson.

The majority states:

> The state bases its standing argument on the language in

> Batson, supra, which requires a defendant to be of the same race as the veniremen being excluded. In our opinion the "same class" language of Batson, goes not to the issue of standing (right to use the issue), but is directed only toward the establishment of a prima facie evidentiary case of purposeful discrimination. Thus, if the defendant and excluded veniremen are of the same race, a strong evidentiary inference may be drawn that prima facie purposeful discrimination has occurred and the burden thereby shifted to the state to explain its actions.

I disagree. Batson clearly states unequivocally that the defendant first must show that he is a member of a cognizable racial group and second that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The foregoing is the threshold requirement. If the first requirement is not met, then it is not necessary to consider the remaining two requirements specified in Batson.

The United States Supreme Court cases cited by the majority are all pre-Batson determinations. Batson is therefore controlling on this issue.

The cases cited by the majority involving U.S.C. Title VII are inapposite, inasmuch as they involve statutory interpretation and not constitutional rights.

A defendant has the right to have an attorney of his choosing, or if indigent, a right to have an attorney appointed by proper authorities. Since this defendant has a black attorney to present his case to the jury, the principles of Batson apply to this defendant as if he were black. He has standing to contest the use of peremptory challenges.

The majority states that under Batson, the initial burden is upon the trial judge to make his discretionary determination "as to whether there is sufficient evidence of purposeful

discrimination in the peremptory striking of veniremen to require explanation by the prosecution for its actions." The majority quotes the following from Batson:

> [i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenge may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's peremptory challenges creates a prima facie case of discrimination against black jurors.

We are therefore required to look at the relevant circumstances including voir dire to determine whether or not the trial court abused its discretion in finding that an inference of discrimination was raised sufficient to

require the prosecutor to give an explanation. In this connection, the record shows the following statement by the trial court referring to one of the two black jurors stricken: "I know he did say, I believe he had a past history, a felony for aggravated assault, or assault, and probation and if my memory serves me correct, he said it was five years ago." The court further stated: "Since both were black, I necessarily have to ask as to both blacks."

It is clear that the trial court made this ruling solely on the basis of the racial exclusion by peremptories without taking into consideration the circumstances revealed on voir dire. In my opinion, the trial court abused its discretion in requiring the prosecutor to respond with respect to the striking of this one juror.

I find no abuse of discretion in requiring the prosecutor to give the

reason for striking the other black juror. The judgment of the trial court should be affirmed with respect only to requiring an explanation with regard to one black juror.

/S/
MELVYN T. SHELLEY, JUDGE